United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH BROWNLEE and
BARBARA BROWNLEE,
Appellants,

vs.

MUTUAL BENEFIT HEALTH and
ACCIDENT ASSOCIATION,
Appellee.

Appellants Brief

Upon Appeal from the United States District Court
of the District of Oregon.

ERNEST COLE, *Attorney for Appellants,*
Portland, Oregon

McCAMANT and THOMPSON, *Attorneys for Appellee,*
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STATEMENT OF FACTS

On the evening of December 31st, 1926, at the hour of 10:00 P. M., Al Feyerabend and Leslie J. Brownlee left Battle Axe Inn at Government Camp, located at the base of Mt. Hood, in Hood River County, Oregon, on the climb up Mt. Hood, with the sole and only purpose of being the first to reach the top of Mt. Hood on January 1st, 1927, both of which had made the trip before. That they reached what is known as Timber Line Cabin at about 1:00 A. M. and left that place for the upward climb at about 2:30 A. M., early in the morning of January 1st, 1927. That Battle Axe Inn is about 4000 feet; Timber Line Cabin 6000 feet; and Mt. Hood 11,225 feet in elevation; that Battle Axe Inn is about four miles from and below Timber Line Cabin, and that Timber Line Cabin is about four miles from and below the summit of Mt. Hood; that in the ascent, they selected a course between two dangerous sections of the mountain, known as Palmer Glacier on the right and Zigzag Glacier on the left, both of which are lined with and contain crevasses, and between which is the usual route taken by climbers from the south side of the mountain; that their footwear consisted of both crampons and snowshoes, and that Leslie Brownlee had what is known as "Beavertail" snowshoes, the only pair of its kind known of around Mt. Hood; that they were both warmly dressed for the climb and carried enough food to last for the return; that shortly after leaving Timber Line Cabin, they encountered a snow storm, and as they got higher on the mountain, it became worse, in fact become so bad that they were unable to see or recognize anything, except the edge of White River Canyon, which beyond was a deep blue, and up the edge of which they con-

tinued, keeping far enough away so as not to fall into it. That as they climbed, the storm become worse and Leslie Brownlee, becoming tired, decided to turn back, which he did after taking Feyerabend's compass; that Feyerabend continued to climb up the mountain, and after what seemed to him to have been a long time, which might have been an hour, more or less, after Brownlee had turned back, he, Feyerabend become discouraged because of not being able to see anything on account of the storm and not feeling safe, also turned back, at which place Feyerabend thought was 10,000 feet in elevation and in the immediate vicinity of Crater Rock, which is about one-fourth mile from and below the summit of Mt. Hood. That Feyerabend in his descent of the mountain, by reason of the storm, become confused and lost his bearings and location, and traveled about one and one-fourth miles out of his way from the course taken upwards, and after considerable difficulty, located himself above and in a direct line from what is known as Mississippi Head, which is above and to the west of Timber Line Cabin. That he proceeded from there to Timber Line Cabin, where upon his arrival he stopped to inquire of an old man there, about Leslie, and left said place at about 2:45 in the afternoon of January 1st, 1927, for Battle Axe Inn, where he arrived about 4:30 in the afternoon of said date. That the weather continued about the same while descending the mountain until he reached an altitude of about 7000 feet, at which place he thought it cleared up some; that, he, Feyerabend had forgotten and could not remember the time and place on the mountain where Leslie Brownlee turned back and which was the last he ever seen of him, but could remember the time of 11:30 A. M., but

could not place the location or event, and if he was not mistaken, they had planned to reach the summit of Mt. Hood between 11:00 A. M. and Noon on January 1st, 1927; that he made an account of the trip upon his arrival back at Battle Axe Inn to Mr. Sickler, which statement was correct, but the court refused to allow Mr. Sickler to testify as to what Feyerabend stated was the time and place where he left Leslie Brownlee and the manner in which he arrived at that time, for the reason that same was immaterial and hearsay; that the mountain in, around and below Crater Rock is lined and full of crevasses, which either fill up or bridge over in the winter time and cannot be seen through which a man may fall, and which crevasses average around fifty, sixty and seventy feet in depth and are dangerous. That there are canyons on the mountain near the vicinity where these boys separated with steep and precipitous sides and high cliffs, and that a person, unless kept moving, would have soon frozen; that the storm was very severe through which nothing could be seen; that these boys left their street clothes at Battle Axe Inn, and that Leslie Brownlee has never been seen or hard of since he was last seen by Feyerabend on Mt. Hood on January 1st, 1927, but would have been seen if he had returned by way of Battle Axe Inn; that a thorough search of the mountain was made for him at the time and during the first week of January, 1927, and also during the summer of 1927, after much of the snow had left the lower parts of the mountain, and no trace of any kind has ever been found of Leslie Brownlee at any time; that it takes much longer time to travel from Crater Rock to Timber Line Cabin coming down the mountain, than it does in coming down from Timber Line Cabin to

Battle Axe Inn, at Government Camp; Feyerabend testified that on the upward climb he seen four persons, which he thought was about two hours below and behind them, and two witnesses of a party of four also testified that they attempted to climb Mt. Hood on Jan. 1st, 1927, and seen two persons ahead of them up the mountain, and that these two persons were about one-fourth mile up the mountain ahead when last seen at about 10:30 in the morning of said date, and that the storm was described as something terrible, and that they were compelled to turn back at eleven in the morning of Jan. 1st 1927, by reason of the storm, as they were nearly frozen to death, and at the time they turned back, were between one-fourth and three-fourths miles from and below Crater Rock and had not overtaken the two persons seen ahead. That Leslie Brownlee carried an accident insurance policy with the defendant and appellee herein, which expired at noon on January 1st, 1927, and as stipulated, (T. of R., p. 53); that the court upon hearing this cause instructed the jury to return a verdict in favor of the appellee herein, upon the grounds that no proof had been offered from which a jury could infer the time, place and manner of Brownlee's death, if dead, basing his presumption upon the fact that Leslie Brownlee was last seen on Mt. Hood at Eleven o'Clock on the morning of January First, 1927, under the conditions as described in the evidence, and as set forth in the Transcript of Record herein, and entered a judgment on said verdict in favor of the appellee herein, from which rulings this appeal is prosecuted upon the following assignment of errors, to-wit:

ASSIGNMENT OF ERRORS

I.

That during the trial of said cause the court erred in refusing to allow the witness E. J. Sickler to testify as to what the witness Al Feyerabend stated to him as to the time and place he last seen and left the insured Leslie Brownlee on Mt. Hood, upon his arrival at Battle Axe Inn on Jan. 1st, 1927, at the hour of 4:30 P. M., (which the appellants offered to prove by the said witness Sickler, that Feyerabend stated he left Leslie Brownlee at the hour of Eleven o'Clock, and that Leslie looked at his watch at the time he left him, and said to him that it was Eleven o'Clock; and that it was in the vicinity of Crater Rock, just below (T. of R., page 47).

II.

That the court erred in directing a verdict for the defendant and appellee herein.

III.

That the court erred in entering a judgment for the defendant herein.

IV.

That the verdict and judgment entered herein in favor of the defendant and appellee herein are contrary to law.

ARGUMENT AND AUTHORITIES RELIED UPON

I.

The great weight of authority holds that the trial court erred in refusing to allow the witness Sickler to testify as to the time and place where Feyerabend stated he left Brownlee on Mt. Hood upon his arrival at Battle Axe Inn on the afternoon of Jan. 1st, 1927,

after Feyerabend had testified that he had forgotten, but that he made a statement to the witness Sickler of the trip which was correct (T. of R., pages 40 and 41).

> Where a witness testifies that he has truly stated to a third person, from his own knowledge, a fact which he has since forgotten, he thereby renders competent the testimony of that person as to what the forgotten statement actually was.
>
> Vol. 22 C. J., page 217 paragraph 181.
>
> Shear vs. Van Dyke, 10 Hun. (N. Y.) 528.
>
> Hart vs. Atlantic Coast Line R. Co., 144 N. C. 91-92, 56 S. E. 559.
>
> Mares vs. State, 158 S. W. 1130 (Tex.).

Feyerabend stated (T. of R., page 40) that he could not remember the time and place Brownlee turned back on the trip up Mt. Hood, which was the last time he ever seen him, but testified that he made an account of the trip to Mr. Sickler after he returned to Battle Axe Inn, which statement was correct (T. of R., p. 41).

The appellants offered to prove by the witness Sickler the time and place which Brownlee was last seen by Feyerabend on the trip up Mt. Hood, which was at Eleven o'Clock in the forenoon of Jan. 1st, 1927, and that he left him just below Crater Rock, but the trial court upon objection of the defendant refused to admit said offered evidence, upon the grounds that same was irrelevant, immaterial and is hearsay. (See T. of R., pages 46 and 47.

We think the court should have admitted said evidence and that the court erred in not doing so, as it compelled the appellants to prove said time and place by circumstantial evidence alone.

II.

The sole question involved herein as to the assign-

ment of errors number II, III and IV, is that the court erred in instructing the jury to return a verdict for the defendant or appellee herein and entering a judgment thereon, and that this cause should have been submitted to the jury for their consideration.

We think the evidence offered by the appellants as to the time and place where Brownlee was last seen by Feyerabend on the said trip up Mt. Hood, was sufficient from which the jury could have inferred that the time was prior to noon of Jan. 1st, 1927, and that the place was in the vicinity of Crater Rock, which is about one-fourth mile below the summit of Mt. Hood.

The witness William Lenz, testified on cross examination, (T. of R., page 60) that it took him five hours and thirty-five minutes to make the trip from the summit of Mt. Hood to Battle Axe Inn, on Jan. 7th, 1927, and on further examination on behalf of appellants, (T. of R., p. 64) testified that he come down in a direct line over a broken trail, which was an average for the eight miles, of one mile in 42 minutes, and it was testified, that the way Feyerabend said he come back, would have been at least one and one-fourth miles further (T. of R., pages 51 and 59) than in a direct line, starting at Crater Rock, and as it was testified that it is about one-fourth mile from the summit to Crater Rock (T. of R., p. 58) we would have Feyerabend traveling at least one mile further, or about nine miles, which at the rate the witness Lenz traveled, would have taken him six hours and 18 minutes to have reached or got back to Battle Axe Inn, from where he turned back (T. of R., p. 44), on the mountain, and where he testified that he arrived at about 4:30 in the afternoon of Jan. 1st, 1927. These parties

may have not traveled at the same rate of speed, but it is certainly evidence for the jury, as it was testimony given on cross examination, and the witness Lenz had better weather and trail to travel over than Feyerabend had on his return trip.

Again we have the testimony of experts that it takes much longer in coming down Mt. Hood to travel between Crater Rock and Timber Line Cabin than it does between Timber Line Cabin and Battle Axe Inn (T. of R. pp. 51 and 55), and one witness, Lenz, stated three times as long (T. of R., p. 58), and Feyerabend stated that he arrived at Timber Line Cabin at about 2:45 in the afternoon of Jan. 1st, 1927, and that it took him about one hour and forty-five minutes to travel on this occasion between Timber Line Cabin and Battle Axe Inn (T. of R., p. 41).

We also have a party of four who turned back at Eleven o'Clock in the forenoon of Jan. 1st, 1927, while attempting to climb Mt. Hood, (T. of R., pp. 48 and 65) on account of the terrible storm as it was described, and who seen two persons ahead, and when last seen at about 10:30 A. M., were about one quarter of a mile ahead up the mountain, and that this party of four were somewhere between one quarter and three-quarters of a mile below Crater Rock at the time they turned back, (T. of R., p. 48) making the fact to be that if these two persons seen ahead were Feyerabend and Brownlee, which no doubt they were, Feyerabend and Brownlee was at that time in the immediate vicinity of Crater Rock at Eleven o'Clock A. M. of Jan. 1st, 1927, and it is a fact from the evidence that Feyerabend and Brownlee left Timber Line Cabin for the upward climb before this party of four left, see (T. of R., pages 42 and 49), and were ahead of this party of

four at some place on the mountain, all of which were facts from which the jury could fix the time and place Feyerabend left Brownlee. We must also take into consideration that Feyerabend traveled up the mountain for some time, after Brownlee turned back, we cannot tell how long as he does not know, before he turned back.

We now come to that place where the trial court says that there was no evidence from which the jury could infer that Brownlee is dead, and if dead, the time and manner of his death.

> Death by suicide will not be presumed from the fact that a person last seen about 10:00 o'Clock at night on board a steamer in mid-ocean. The presumption is in favor of his having fallen overboard, either by accident or by some external force applied to him, and the death is within the risks assumed by an accident policy insuring against death from bodily injury effected through external, violent and accidental means.
>
> Travelers Ins. Co. vs. Mary Rosch, 13-23 Ohio Circuit Courts Consolidated 491; aff., 70 N. E. 1133; 69 Ohio State Reports 561.

The above case involved an action on an accident insurance policy where a man was last seen in mid-ocean on a steamer, which reached its destination and did not encounter a storm, and the court on page 493 and 494 thereof, says:

> "It is possible that Rosch is living, as it is possible that if one sets in this court room and fires a pistol at another, and that other be found immediately thereafter dead with a bullet in his body, that he died of heart failure just before the bullet struck him; but everybody would find and every jury and every sensible man in the world would find in the case last stated that the man died from the bullet wound. And it seems as though we could not doubt that every sensible man with

these facts before him would find this man dead.

It is said, on the part of the plaintiff in error, that it is but an inference that he is dead. It is an inference, such an inference as carries absolute conviction to every thinking man.

Now it is said that to hold he died by external violence is an inference upon an inference, which ought not to be allowed; but the jury found, as they necessarily must have found, that this man was dead. And if the question had been directly put to them, DID HE DIE BY DROWNING, it can hardly be doubted that they would have answered in the affirmative, and if he died by drowning he died by that external violence which is insured against in this policy, unless it was a case of suicide."

We contend that under the pleadings in the present case, that the jury could have decided this case, with an answer to the following question:

Did Brownlee, prior to noon of Jan. 1st, 1927, fall into a crevasse on Mt. Hood, as a result and by reason of the exposure to the stormy and freezing conditions existing thereon, the effects from which he died at that time or at any time prior to Jan. 20th, 1927?

It was not necessary for Brownlee to have met his death prior to noon of Jan. 1st, 1927, under the policy; it was only necessary that he meet with some accident prior to that time, the effects from which caused his death at any time prior to Jan. 20th, 1927, under the pleadings and policy, although if he fell into a crevasse, which no doubt he did, his death was probably instantaneous. The policy in this cause states accidental means only and does not require external and violent means.

This boy when last seen, was in a storm so severe that nothing could be seen in front of him (T. of R., pp. 35 and 37), and there are many deep crevasses

and holes in the vicinity and below Crater Rock (T. of R., pp. 50, 55 and 58) which either fill up or bridge over in the winter time and cannot be seen.

We contend that this boy when last seen was not only coming in contact with a specific peril but was already in a position and surrounded by an imminent peril from which a continuation of life would be inconsistent from a disappearance thereon, and that the jury had a right to infer that he met with a fatal accident immediately after he was last seen by Feyerabend, and that this case should have been submitted to the jury for their decision.

In the case of FIDELITY MUTUAL LIFE ASS'N vs. METLER, 185 U. S. 308, the court on page 316 thereof, speaking of the foot prints and flowing river, says:

> "Indicated what might have happened, and the fact he did not return etc., rendered the inference of FATAL ACCIDENT REASONABLE."

which case involved a life insurance policy, but the principle as laid down therein and from the decision of the court as given, we think makes that case appliable here, as if there was grounds for the inference of a FATAL ACCIDENT, it would also have been submitted to the jury in case the action had been brought upon an accident insurance policy, as the facts therein covered an accident.

The insured, Hunter was thought or supposed to have drowned in the Pecos river, but no one seen him, and neither was he ever seen or heard of afterwards, although there was some evidence offered that he was afterwards seen alive, and the court again on page 319 thereof, says:

> "There was no evidence that Hunter was in a position of peril when last seen. The evidence did, indeed, tend to show that he probably fell into the river, and so came in contact with a specific peril, and there was evidence regarding the depth, etc., of the river."

which decision affirmed the lower court and was written by C. J. Fuller.

Leslie Brownlee was surrounded with crevasses and cliffs, which could not be seen in the storm, and to stand still meant freezing to death, (T. of R., p. 41), and it appears to us that the present case is much stronger than the case last above cited.

In the case of CONTINENTAL LIFE INS. CO. vs. Searing, 240 Fed. 653, and on page 657 thereof, the court, speaking of Searing going in bathing and not having been seen again, says:

> "In view of this proof, was the court bound to withdraw the case from the jury and to hold as a matter of law, that no inference could be drawn from these proofs that the insured was dead."

and again on the same page thereof, the court, speaking of no presumption of death until after the lapse of seven years, says:

> "This presumption of life can be met and overcome by proof of circumstances of specific peril to which the person disappearing was subjected, and we think there was evidence in this case which, if believed, tended to show such peril."

and in the same case on the same page thereof, the court says:

"That each case of disappearance has its own individual facts", and it is true that the last case above cited was reversed and a new trial ordered, but only upon errors in the admission of evidence, which does not effect the principle upon which the court dwells as to an inference from coming in contact with a spe-

cific peril or placed in a position of imminent peril, and while it also involved a life insurance policy, we think it also comes within the principle of an accident insurance policy for the reason that all authorities hold drowning is an accident, and upon that ground would be in the same class with the case of Travelers Ins. Co. vs. Rosch, Supra, and under which also comes the case of Lancaster et al vs. Wash. Life Ins. Co., 62 Mo. 121, of which the Syllabus reads as follows, to-wit:

> In a suit on a life insurance policy, it appeared that the assured who was an unmarried man of about forty years of age, took passage on a lake steamer bound for Buffalo; that on the voyage he seemed to be sick and despondent; that while the vessel was in Lake Huron, he was seen in the evening on the guard, and leaning out through a "shutter" in the bulwark of the boat, which opened upon the water; that on landing at Buffalo, ineffectual search was made for him, but in his stateroom were found his coat, hat and valise; that the vessel stopped at way points, but he was not seen to go ashore, and could not have landed unobserved; Held, that the testimony was amply sufficient to show that he was brought in contact with a SPECIFIC PERIL, and to raise a presumption that his death was the result of ACCIDENT.

AND taking the case of THE SAN RAFAEL R. R. CO., ET AL vs. HALE ET AL, 141 Fed. 270, which the trial court says is not an authority here, while it is a fact that the boat went down which Hale was supposed to have been upon, nevertheless counsel for the appellant in that case claimed that it was a presumption on a presumption for the court to infer that Hale was on the boat, and then infer that he went down with it, as there was no direct testimony or evidence that Hale was on the boat, and none to show that if he was on the boat, that he went down with it and

perished or drowned, and on page 279 thereof, the court says:

> "To do so is not, as contended by the Proctor for the appellant, basing presumption upon presumption, but it is the drawing of the proper and logical inference from all the facts and circumstances disclosed by the evidence in the case",

and is it not a fact that in the present case, we have a better foundation from which the proper and logical inference may be drawn that Brownlee met with a fatal accident, then existed in the last case cited above, for the reason that we know that Brownlee when last seen was on Mt. Hood in a severe storm, where there exists many crevasses which might bring death at any moment and which could not be seen in the storm; exposed to weather which would soon freeze a man to death if he did not keep moving, and all the authorities hold that freezing to death is also an accidental death, as it is said in the case of THE N. W. COM. TRAVELERS ASS'N vs. LONDON GUARANTEE & ACCDT CO., 10 MAN. 537 (1895),

> "The assured was frozen to death on the prairie near fort MacLeod to which place he was returning from one of his trips in company with the driver. While still about eight miles out, the wagon broke down. The weather had turned suddenly very cold and stormy, and the assured being to cold and numb to walk, and unable to ride, it was agreed that he should remain where he was while the driver rode to MacLeod for assistance, but he died before the driver returned. The assured was sufficiently warmly clothed for the weather as it was when he set out, but not for the storm which he encountered; HELD, that he met his death as the result of an injury effected through external, violence and accidental means, within the meaning of the policy, and that it could

> not be said that he exposed himself to any obvious or unnecessary danger; and that the plaintiffs were entitled to recover."

and also see the case of Brady vs. Oregon Lumber co., 117 Oreg. 189, which holds that freezing is an accidental injury.

The next question is upon what authority would the jury be warranted or justified in fixing the time from the evidence that Brownlee met with a fatal accident prior to noon Jan. 1st, 1927.

We find that the great weight of authority is to the effect and holds that where a person was last seen in a state of imminent peril that might probably result in his death, and is never seen or heard from again, though diligent search has been made, that the inference of immediate death may justly be drawn, as in the case of THE N. W. MUTUAL LIFE INS. CO. vs. Stevens et al, 71 Fed. 258, and on page 261 thereof, the court says:

> "It is conceded that when one who is last seen, is in a state of imminent peril that might probably result in his death, is never again heard from, though diligent search for him is made, the inference of IMMEDIATE DEATH may justly be drawn",

which is supported by the following authorities, to-wit:

> Carpenter vs. Sup. Council Legion of Honor, 79 Mo. App. 597.
> Tisdale vs. Ins. Co., 26 Iowa 170.
> Lancaster et al vs. Wash. Life Ins. Co., 62 Mo. 121.

and in the case of N. W. Mutual Life Ins. Co., vs. Stevens et al Supra, the court, also on the same page 261 thereof, says:

> "That two cases of disappearance in which the facts are exactly alike will probably never arise

and the strength of the presumption of life or death will never be the same in any two cases".

It was impossible for us to produce a case to the trial court wherein the facts are exactly the same as in the present case, and we must rely more or less upon logical reasoning from cases of these kind which have gone before, and in which the principle and reasoning is based upon the same foundation.

These cases of explained disappearance as we understand the law, are cases within and unto themselves based upon logical reasoning founded upon the experience and knowledge as living beings coming in contact with the forces of nature and the desires, wishes and the weakness of man.

It is said in Vol. 17 C. J. page 1169:

> "The presumption of death from seven years absence DOES NOT PRECLUDE AN INFERENCE THAT DEATH MAY HAVE OCCURED BEFORE THE EXPIRATION OF SUCH PERIOD, WHERE THERE ARE CIRCUMSTANCES WHICH WOULD JUSTIFY A CONVICTION THAT DEATH OCCURRED AT AN EARLIER DATE, as for instance that the absent person, during the period after his disappearance encountered some SPECIFIC PERIL, or was subject to some immediate danger calculated to destroy life, or where the circumstances are such as to make it improbable that he would have abandoned his home and family;"

and many authorities cited therein.

And as the court well said in the case of LANCASTER ET AL, vs. WASH. LIFE INS. CO., Supra. on page 128 thereof, speaking of the seven year presumption:

> "That when last heard from he was in contact with some specific peril likely to produce death,

> or that he disappeared under circumstances inconsistent with a continuation of life. When considered with reference to those influences and matters which ordinarily control and direct the conduct of rational beings; in either of which cases the jury are at liberty to infer that death occured at such time within seven years as from the TESTIMONY MAY SEEM MOST PROBABLE":

Defendant of course will contend that he might have died from other causes not accidental; it was so contended in the cases heretofore cited herein, but what would a reasonable sensible man say become of Leslie Brownlee. Can it be said that the trial court was more competent than a jury of twelve competent men to pass upon the question as to whether the evidence herein carried a conviction of what become of Leslie Brownlee, and that as a question of law no inference could be had therefrom?

It was said by the court in the case of STANDARD LIFE & ACCIDENT INS. CO. vs. THORNTON, 100 Fed. 582-40 C. C. A. 564, that:

> "A case can properly be withdrawn from the jury, only when, on a survey of the whole evidence and giving effect to every inference fairly or reasonably to be drawn from it, the case is palpably for the party asking a preemptory instruction";

Brownlee was more or less experienced in mountain climbing and had been on Mt. Hood before. If nothing fatal had of happened to him within a very short time after he was last seen, he no doubt would have reached safety and would have passed the Glacier fields, or else his body would have been found when the snow left the lower levels. No other conclusion can be reached, other than he fell into a crevasse and was covered over with snow and ice in the glacier fields on Mt. Hood and never will be found.

Now if an inference could be had, such as was held could be had in the cases of The TRAVELERS INS. CO., vs. ROSCH, SUPRA: FIDELITY MUTUAL LIFE INS. vs. METLER SUPRA: LANCASTER vs. WASH. LIFE INS. CO., SUPRA; SAN RAFAEL R. CO. vs. HALE et al, Supra; and N. W. MUTUAL LIFE INS. CO., vs. STEVENS et al Supra; is it not reasonable that such an inference could also be had by the jury in the present case from the evidence given in this case and as shown by the T. of R. herein?

Brownlee was certainly in a perilous position when last seen. He could not stand or remain in one place long without freezing to death, and he was surrounded with crevasses and cliffs in a storm which prevented him from seeing them, and no doubt many were lightly bridged over and could not have been seen in any kind of weather; and in which he could easily have met his death.

COUNSEL for defendant and appellee herein in the trial court relied a great deal upon the case of Insurance Co. vs. McConkey, 127 U. S. 661, but we fail to see where that case has anything in point with the present case, for the reason that the policy in that case is entirely different from the policy involved in the prsent case, as on page 666 thereof, the court says:

> "The policy provides that the insurance shall not extend to any case of death or personal injury, unless the claimant under the policy establishes by DIRECT AND POSITIVE PROOF that such death or personal injury was caused by external, violent and accidental means."

which case was reversed only upon an instruction given to the jury by the trial court and remanded back for a new trial, which the court on page 667 thereof, says;

> "We, are however of the opinion that the instructions to the jury were radically wrong in one particular. The policy expressly provides that no claim shall be made under it where death of the insured was caused by "INTENTIONAL INJURIES INFLICTED BY THE INSURED, OR ANY OTHER PERSON." If he was murdered, then his death was caused by INTENTIONAL INJURIES INFLICTED BY ANOTHER PERSON. NEVERTHELESS, the instructions to the jury were so worded as to convey the idea that if insured was murdered, the plaintiff was entitled to recover."

The policy involved in the case last above cited provided for DIRECT AND POSITIVE PROOF and besides also provided that no recovery could be had if the insured was either shot by some one intentional or by himself. That case is no where in point in the present case.

Defendant also cited the case of Keefer vs. Pac. Mutual Life Ins. Co., 20 Pa. 448, 51 Atl. 366, as being in point in the present case, which held that an inference cannot be founded upon an inference, which case is not in point herein for the reason that nothing was shown that the insured was in a position of peril when last seen alive or that he come in contact with a specific peril, or might have come in contact with a specific peril and it was not a disappearance case; the case was based upon entirely different facts under different conditions than the present case. It appears that the trial court based its decision in its opinion herein upon the case of KANSAS CITY SOUTHERN R. R. vs. Franklin D. Jones decided by Justice Holmes on March 12, 1928. We have examined this case carefully and fail to see where it applies here. The question involved in that case was whether the deceased

was negligent or the defendant, and as there was no evidence to show that the defendant was negligent, no action could be maintained, as it was necessary, as I understand the case, to show that the defendant R. R. Co., was negligent. There is no question of negligence involved in the present case. If negligence is involved in the present case, and the case last above cited and relied upon by the trial court applies in the present case, then the cases of The Travelers Ins. Co., vs. Rosch Supra, and the case of Fidelity Mutual Life Ins. vs. Metler, 185 U. S. 308, Supra, are wrong and should have been reversed, and that the case cited and relied upon by the trial court would also have applied in the two last above named cases, and in all the other cases cited and relied upon in this brief by the Appellants herein, and you might as well say that in case of sickness and death under a life insurance policy, the question could be raised; Was the insured negligent in getting sick, and then was he negligent after he become sick, in not employing competent medical services, or would it be necessary to show that he was free from negligence?

AND in conclusion, we Respectfully submit to this Hon. Court that the trial court erred in the trial of this cause upon all and each of the assignment of errors assigned herein, and that this cause should have been submitted to the jury for their consideration, and that the judgment entered herein is erroneous and and should be reversed.

Respectfully submitted,

ERNEST COLE,

Attorney for Appellants.